Filed 7/10/20 Shimmick Construction v. City of Long Beach CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

SHIMMICK CONSTRUCTION COMPANY, INC./, FCC CONSTRUCCION S.A./IMPREGILO S.P.A., a joint venture, Plaintiff and Respondent, v. CITY OF LONG BEACH, Defendant and Appellant.	B298465 (Los Angeles County Super. Ct. No. 18LBCP00029)

APPEAL from an order of the Superior Court of Los Angeles County, Michael P. Vicencia, Judge. Affirmed.

Theodora Oringher, Kevin A. Dorse, Erich R. Luschei, and Panteha Abdollahi; Office of the City Attorney, John C. Parkin and William R. Baerg for Defendant and Appellant.

Watt, Tieder, Hoffar & Fitzgerald, Brent N. Mackay, Lewis J. Baker and Richard G. Mann, Jr., for Plaintiff and Respondent.

A municipality and a private construction firm enter into a $650 million public works contract. Understandably, they agree to an elaborate dispute resolution procedure – comprised of both mediation and arbitration components – to settle the inevitable disputes they will have over the course of the project. Perhaps unexpectedly, the parties cannot even agree on how the dispute resolution procedure itself works. Many disputes are left in abeyance. Litigation ensues – not to resolve a particular construction dispute, but over *how* those disputes are going to be resolved. The trial court issues an injunction against one of the parties to compel compliance with the dispute resolution process. That party appeals. On appeal, both parties raise additional complaints regarding the procedure used. We resolve the procedural imbroglio and affirm.

OVERVIEW

On July 23, 2012, the City of Long Beach (the Port) entered into a public works contract with a design-build contractor called Shimmick Construction Company, Inc./FCC Construcción S.A./Impregilo S.P.A. (Shimmick) for the design and construction of the Gerald Desmond Bridge, for the approximate price of $650 million.[1]

Pursuant to the contract, disputes between the parties were to be resolved by a three-member Disputes Review Board (DRB) – with one member appointed by each party and the third member appointed by the first two. If the dispute involved $375,000 or less (which the trial court characterized as "limited" claims), the DRB would act as an arbitration panel; if the dispute

---

[1] A later declaration filed by the Port's program director for the project stated that the project was for $1.5 billion.

was in excess of $375,000 ("unlimited"), the DRB would provide nonbinding recommendations akin to a mediation.

When the Port lost faith in the DRB, it fired the member it had appointed, which it had the unilateral right to do, but refused to appoint a new member to replace him. Instead, it waited nearly three years, and then sought the appointment of a new DRB, under a provision found in one of the exhibits to the contract. The Port asserted that under the exhibit each party had "the right to require appointment of a new disputes review board to resolve future [d]isputes, which right may be exercised at any time by delivery of notice to such effect to the other party and to the [b]oard [m]embers." Believing that the Port's interpretation of this language was contradicted and negated by other contract provisions, Shimmick took the position that the Port's attempt to obtain a new board was without effect. The Port continued to refuse to appoint a new member to the then-existing DRB, leaving the DRB unable to function.

When the growing number of unresolved disputes between the Port and Shimmick necessitated a functioning DRB, the parties sought court intervention to resolve their stalemate. Unfortunately, the dual nature of the DRB as both arbitrators and mediators made for confusion as to the proper basis for jurisdiction – specifically, whether jurisdiction should be invoked under the California Arbitration Act (Code Civ. Proc., §§ 1280 et seq.) or more generally by a complaint for declaratory relief (§ 1060).[2] Ultimately, the court resolved the matter under the Arbitration Act, and the parties initially agreed the court's order extended to the DRB acting as mediators as well. The court

---

[2] All undesignated statutory references are to the Code of Civil Procedure.

concluded the clause on which the Port relied did not provide for the appointment of a new DRB. As such, it entered an order requiring the Port to replace its member on the existing board. The Port complied.

The Port appeals. In addition to the substantive issue of contract interpretation, the parties present a number of procedural issues: (1) whether the trial court had jurisdiction to enter its order under the Arbitration Act when there was no pending arbitration (limited) claim between the parties; (2) whether the trial court's order properly extended to the DRB sitting as mediators as well as arbitrators; (3) whether the trial court's order is non-appealable as an order preliminary to arbitration; and (4) whether the appeal is moot, or waived, by the Port's eventual appointment of a replacement member to the DRB in compliance with the trial court's order.

We reject all of the procedural challenges and conclude the trial court was correct in its ultimate interpretation of the contract; we therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Contract Terms*

Two contract documents governed the relationship between the parties, at least as concerns the DRB. We describe these documents only in sufficient detail for the analysis that follows. The key contractual documents are "Book 1 Design-Build Contract," and a separate "Disputes Review Board Agreement," which was to be in the form of Exhibit I to Book 1.[3]

Book 1 of the contract contained section 18.2, which governed the dispute resolution process, and provided for the

---

[3] We refer to the first document as "Book 1" and to the second as the "DRB Agreement."

establishment and powers of the DRB. The parties agreed to a three-level informal dispute resolution process, followed by a fourth level before the DRB if the informal process was unsuccessful. The DRB resolved limited claims ($375,000 or less) in binding arbitration; it issued only nonbinding recommendations for unlimited claims (over $375,000).

We discuss several of the contractual provisions below. Part A of this section deals with the selection, termination and withdrawal of a member of the DRB as set forth in section 18.2 of Book 1. Part B discusses additional terms set forth in the separate DRB Agreement.

A. *Provisions in Book 1 of the Contract*

There are two relevant provisions in section 18.2 of Book 1 – the first governing the initial makeup of the DRB and the second governing the termination and replacement of individual DRB members.

(1) *The Initial Makeup of the DRB*

Under section 18.2.4, "The DRB shall consist of one member selected by Port and approved by [Shimmick], one member selected by [Shimmick] and approved by Port, and a third member selected by the first two members and approved by both Port and [Shimmick]." When each party nominates its member, it is required to give the other party its nominee's disclosure statement. Objections shall be for cause, but each party may "on a one-time basis" object to the other's nominee without specifying a reason.[4] As to the third member, there is a

[4] The issue of what constitutes proper cause for objecting to a DRB nominee or, later, removing one from the board, is not raised by this case, as the Port sought to replace the entire DRB without establishing cause. For this reason, we will use the

multi-level process designed to result in a neutral approved by both parties.[5]

Upon the initial appointment of the DRB, its members "shall execute" a DRB Agreement "substantially in the form" of Exhibit I to Book 1 of the contract.

(2) *Termination and Replacement of a DRB Member*

Section 18.2.5 is entitled "Termination, Replacement of DRB Member." Section 18.2.5.1 provides that a DRB member may be "terminated immediately, by either Party, for" cause. It also provides that, at any time, "upon not less than 15 [d]ays prior written notice to the DRB members and the other Party," any side may unilaterally terminate its appointee, and the third member may be terminated on the recommendation of the two appointed members and the mutual written approval of the parties. When a member is replaced, the replacement member shall be appointed in the same manner as the member being replaced, within 30 days.[6]

B. *Provisions in the DRB Agreement*

In addition to the body of Book 1, the DRB Agreement also contains language on the dispute resolution process. The DRB

---

imprecise term "cause" as shorthand for the contractual reasons for termination.

[5] The precise steps of this process are unnecessary to this appeal. We observe only that the parties went into substantial detail in formulating a process for the appointment of a neutral third member.

[6] The requirement that a member who replaces its appointee act within 30 days is implicated in the parties' contractual arguments on appeal.

Agreement is first found as an unexecuted document attached in Exhibit I to Book 1. It is "made and entered into" "among" the Port, Shimmick, and three selected DRB members. The form DRB Agreement in Exhibit I to Book 1 contains unsigned signature blocks for all five parties, and they did, in fact, all execute a standalone version of the DRB Agreement. The DRB Agreement the parties executed was nearly identical to the unsigned form in Exhibit I, except for one additional provision we discuss below.

The DRB Agreement contains three relevant provisions: one governing withdrawal and replacement of members; one suggesting a party could demand the appointment of a new DRB to resolve future disputes (the provision on which the Port relies); and a new provision, added at the request of the DRB members, governing their indemnification and compensation in the event their services were no longer required.

(1) *Withdrawal/Replacement of a DRB Member*

Section 2.4 of the DRB Agreement provides: "[b]oard [m]embers may withdraw from the [b]oard upon delivery of written notice of withdrawal to Port, [Shimmick] and the other [b]oard [m]embers, which notice shall specify a withdrawal date at least 30 days following the date of delivery of the notice. In addition, a member may be terminated by Port or [Shimmick] in accordance with [s]ection 18.2.5.1 of the [c]ontract [for cause]. Should the need arise to appoint a replacement [b]oard [m]ember, the replacement member shall be appointed in the same manner as provided by the [c]ontracts for appointment of the original member. The selection of a replacement [b]oard [m]ember shall begin promptly upon notification of the necessity for a replacement and shall be completed within 30 days thereafter.

The change in [b]oard membership shall be evidenced by the new member's signature on this Agreement."

(2) *Provision for New DRB to Resolve Future Disputes*

Section 2.5 of the DRB Agreement is at the center of the parties' disagreement. It provides: "The [b]oard [m]embers acknowledge[7] that Port and [Shimmick] each have the right to require appointment of a new disputes review board to resolve future [d]isputes, which right may be exercised at any time by delivery of notice to such effect to the other party and to the [b]oard [m]embers. In such event a new agreement in the same form as this agreement will be executed establishing the new board, and except as otherwise mutually agreed by Port and [Shimmick], the work to be performed by the [b]oard established under this Agreement shall be limited to [d]isputes submitted to the [b]oard before delivery of the notice requiring appointment of a new [b]oard. Nothing shall prohibit Port or [Shimmick] from reappointing its current member."

There is no extrinsic evidence that explains the inclusion of section 2.5 in Exhibit I to Book 1 of the contract, and, thereafter, in the executed DRB Agreement. According to the Port's Program Director for the project, section 2.5 was important to the Port "in order to ensure the parties had a remedy if they lost confidence in the impartiality of an established DRB."

There is extrinsic evidence as to the next relevant provision, section 2.8.

---

7 The use of the word "acknowledge" here is significant, and formed the basis for the trial court's conclusion that this clause does not grant any additional rights to the parties.

(3) *Continued Indemnification/Pay Provision*

Section 2.8 was not part of the original Exhibit I to Book 1 of the contract but was added to the executed DRB at the request of the DRB members and with the agreement of both parties. Section 2.8 provides: "In the event of termination, withdrawal or replacement of a [b]oard [m]ember in accordance with [s]ection 2.4, or appointment of a new disputes review board to resolve future [d]isputes in accordance with [s]ection 2.5: (a) the [p]arties' obligations to [b]oard [m]embers stated in [s]ection 8.2 [indemnification] will survive such action; and (b) the [p]arties will pay any outgoing [b]oard [m]ember all fees earned and expenses incurred prior to the effective date of the termination, withdrawal or replacement of that [b]oard [m]ember." Although section 2.8 was ostensibly a pay and indemnification provision protecting the DRB members, its reference to [s]ection 2.5 forms part of the Port's contractual argument.

C. *Conflict Provision*

The parties' disagreement about the meaning of the contract boils down to whether section 2.5 of the DRB Agreement – with its reference to a new DRB to resolve future disputes – constitutes an additional agreement between Port and Shimmick; or whether Book 1, section 18.2.5.1 – "Termination, Replacement of DRB Member" – sets forth the exclusive means of removing and replacing a member of the DRB, and therefore takes precedence over any contrary suggestion in section 2.5.

The DRB Agreement contains a conflict provision that helps resolve the issue. Section 8.3 provides, "The parties intend for [s]ection 18 of the Contract and the other terms of this Agreement to be complementary. Except as otherwise

specifically provided herein, in the event of any conflict between this Agreement and said [s]ection 18, [s]ection 18 shall control."

2. *The Parties' Dispute*

All was apparently calm and copacetic in Long Beach during the first year after the contract was executed. The DRB was established. The Port nominated Ernest Holt and Shimmick nominated Daniel Meyer; neither party objected to the other's nominee. Holt and Meyer together selected Robert Smith as the third member; again neither party objected. These three members of the DRB executed the DRB Agreement, which was also signed by the Port and Shimmick.

The DRB went into operation, and on July 17, 2014, it issued a report with recommendations on several unlimited claims.[8] On September 26, 2014, the Port sent Shimmick a letter disagreeing with and rejecting the DRB recommendations on these claims. Not only did the Port believe the DRB was simply wrong in its proposed resolution of the disputes, it believed the DRB went beyond its contractual authority. In short, the Port no longer "trust[ed] this DRB to be impartial."

A. *The Port Terminates Its Member and Declines to Use the DRB*

On October 28, 2014, the Port gave Shimmick 15-days notice that it was terminating its member, Holt, from the DRB, under section 18.2.5.1 of the contract. In apparent disregard of section 18.2.5.2 that a replacement be named within 30 days, the Port stated that it "does not intend to nominate a replacement" for Holt. It further gave Shimmick notice that it "will not

---

[8] We use the word "recommendations," because, as observed earlier, for unlimited claims the DRB acted more like mediators and made recommendations to resolve the dispute.

participate in the DRB process going forward." Believing the DRB violated the terms of its contract, the Port indicated that it would "focus its efforts on working directly with [Shimmick] to resolve disputes between the parties."

B. *Shimmick Claims the Port Breached the Contract*

Shimmick responded, claiming that the Port lacked authority to do any of the three things it purported to do in its October 28 letter: terminate Holt, refuse to replace him, and abrogate the DRB process. Shimmick assigned this conduct as a breach and gave the Port notice and an opportunity to cure. Indeed, Shimmick elected to commence the parties' informal dispute resolution process to resolve the very dispute over the DRB.

C. *Positions Taken at the Parties' Informal Resolution Meeting*

On November 10, 2014, the parties had their first level meeting in an attempt to resolve the DRB impasse. The minutes of that meeting reflect that the Port took the position that its "only unilateral recourse is to terminate its appointed member." Shimmick now acknowledged that the Port did have the unilateral right to terminate Holt, but complained that the Port failed to document the need to do so (section 18.2.5.1) or nominate a replacement (section 18.2.5.2). On the issue of failure to nominate a replacement, the Port's position was, "[a]bsent an agreement with [Shimmick] to replace the whole DRB, the only recourse the Port has is to remove its nominated member." Shimmick would later use this statement to argue that Port did not then believe that section 2.5 of the DRB Agreement (on which the Port now relies) gave the Port the *right* to demand appointment of a new DRB to resolve future disputes. Shimmick

would emphasize the Port's language – "Absent an agreement with [Shimmick]" – as demonstrating that the Port knew there was no unilateral right to a new board.

By letter of November 13, 2014, the Port confirmed its position, stating that it would not replace Holt "with the remaining members of this DRB still in place." The Port repeated its understanding that mutuality was required for a new board: "Absent [Shimmick]'s agreement to dismiss all members of the DRB, the Port's sole recourse is to remove Mr. Holt for his part in the entire DRB's failure."

D. *The Parties Try to Work Around the Impasse*

The parties did not elevate the dispute to the second level of informal resolution. While the Port and Shimmick had other disputes which normally would have gone to the DRB, the Port refused to return to the existing DRB. In August 2016, the parties agreed (with a reservation of rights) to engage a single person to act as a project neutral to help resolve disputes. This did not last for long.

E. *Shimmick Demands the Reinstatement of the DRB*

By June 2017, nearly three years after the Port terminated DRB member Holt, it was apparent that the neutral was not a viable solution. The parties had over 100 unresolved issues, 91 of which had been outstanding for more than two years. Shimmick identified five of these disputes which it wanted to refer to the DRB, and requested the Port to immediately appoint a new member to replace Holt.

F. *The Port Requests a New DRB Under Section 2.5 of the DRB Agreement*

By letter of June 28, 2017, the Port responded, indicating that it was "prepared to work with [Shimmick] to re-establish a

DRB." For the first time in the parties' three-year DRB limbo, the Port invoked section 2.5 of the DRB Agreement. The Port wrote that "the dispute resolution process should be continued by appointment of a new DRB in accordance with paragraph 2.5 of the Disputes Review Board Agreement. The Port is currently in the process of reviewing candidates for the Port's appointed member and requests that [Shimmick] advise the Port as to its nominee."

Even though the record reflects the June 28, 2017 letter was the first time the Port had raised section 2.5, the Port took the position that it had always been relying on this provision.[9] The Port's gloss on its earlier position was that, as it had lost faith in the DRB, it had used "its only available remedy to address this deficiency; namely, terminating the Port's DRB member and requesting that [Shimmick] appoint a new member to establish a properly constituted, neutral DRB."

G. *Shimmick Disagreed and Continued to Demand a Replacement for Holt*

On July 12, 2017, Shimmick responded, expressing relief that the Port wanted to return to the DRB process, but maintaining its position that it would not replace its appointed member. Shimmick argued there was no legal basis for the Port's position, claiming it was "an improper attempt by the Port to hold the DRB process hostage until and unless [Shimmick] terminates

---

[9] The Port's first written invocation of section 2.5 was in the June 28, 2017 letter: "The Port continues to believe that the dispute resolution process should be continued by appointment of a new DRB in accordance with paragraph 2.5 of the Disputes Review Board Agreement."

its appointed member." Shimmick again demanded the Port replace Holt on the original DRB.

H. *The Port's Reiteration*

By letter of August 4, 2017, the Port wrote Shimmick, reaffirming its willingness to proceed with a new DRB. It also set forth its argument that Shimmick was misreading the contract. Specifically, the Port drew a distinction between the right to terminate an individual member and the right to require formulation of a new DRB. The Port also explained that a new DRB was necessary in order for it to have confidence in the DRB, which was critical to the DRB effectively resolving anything in mediation.

I. *The Port Formally Invokes Section 2.5 of the DRB Agreement*

On October 20, 2017, the Port sent notice to Meyer and Smith – the two remaining DRB members – and Shimmick, purportedly under section 2.5 of the DRB Agreement that it "is exercising its right to require appointment of a new Disputes Review Board. Accordingly, the services of M[e]ssrs. Smith and Meyer are no longer required on this project."[10]

J. *Shimmick's Rejects the Invocation of Section 2.5*

On November 2, 2017, Shimmick wrote back, saying that section 18.2.5 of Book 1 of the contract governs termination of

---

[10] In its letter to Shimmick back on October 28, 2014 when it first objected to the board's initial set of recommendations and removed Holt from the board, the Port did not rely on section 2.5: "This letter serves as the Port of Long Beach's (the 'Port's') 15-day notice under [s]ection 18.2.5.1 of the Design-Build Contract [i.e., Book 1] of the Port's termination of Ernie Holt as a member of the Disputes Review Board ('DRB')."

DRB members, and that section 2.5 of the DRB Agreement did not give the Port the unilateral right to terminate Smith and Meyer. Shimmick asked Smith and Meyer to disregard the Port's letter as baseless and of no effect.

After an exchange of more letters and running the dispute through the informal dispute resolution process, the parties remained at standstill. Shimmick attempted to submit the dispute to Smith and Meyer, as the two remaining members of the DRB. On August 30, 2018, Smith sent a letter to the parties, stating that he had discussed the purported referral with Meyer, and they agreed that they "do not have jurisdiction over the purported referral and lack the authority to accept it."

The dispute regarding the composition of the DRB was destined for court resolution. Unremarkably, the parties could not agree on the proper procedure by which to invoke court jurisdiction.

3. *Pleadings in the Trial Court*

Shimmick brought suit. By the time it was all over, (1) Shimmick had filed a petition to compel arbitration and compliance with the contractual dispute resolution procedures; (2) the Port had filed a petition to compel appointment of a new arbitration panel and a complaint for declaratory relief; and (3) Shimmick had filed a cross-complaint for declaratory relief.

A. *The Main Procedural Dispute*

The reason for the diverse set of pleadings was that the Port believed there was a distinction in the relief that could be sought depending on whether one was considering the DRB as an arbitration panel or a mediation panel. The Port believed remedies under the Arbitration Act could apply only when DRB was presiding over an arbitration ("limited cases"). In order to

obtain relief regarding the DRB as mediators, the Port believed declaratory relief was necessary.

Shimmick disagreed, specifically arguing that its petition to compel arbitration was broad enough to obtain relief governing the composition of the DRB even when it acted in its mediation capacity. Shimmick argued that the unlimited-claim mediation services, "are part and parcel of the standing arbitration panel and inform the panel members to enable swifter and more consistent arbitration decisions and DRB procedures. Not enforcing the entire agreement with the arbitrators would be a disservice to both the arbitration and DRB procedures, as well as to both the arbitrators/DRB members and [Shimmick]." Nonetheless, once the Port raised the distinction, Shimmick filed a cross-complaint for declaratory relief to cover its bases.

B. *The Main Substantive Dispute*

The dueling petitions under the Arbitration Act afforded each party with at least three opportunities to make its arguments in writing. The dispute at bottom was straightforward. Shimmick wanted the court to order the Port to replace Holt and participate in the DRB process before a DRB consisting of Smith, Meyer, and Holt's replacement. The Port wanted the court to give effect to the Port's invocation of section 2.5 of the DRB Agreement, and order appointment of a whole new DRB.

At this juncture, we repeat verbatim section 2.5 as it informs much of the events we describe next. Section 2.5 provides, "[t]he [b]oard [m]embers acknowledge that Port and [Shimmick] each have the right to require appointment of a new disputes review board to resolve future [d]isputes, which right may be exercised at any time by delivery of notice to such effect

to the other party and to the [b]oard [m]embers. In such event a new agreement in the same form as this agreement will be executed establishing the new board, and except as otherwise mutually agreed by Port and [Shimmick], the work to be performed by the [b]oard established under this Agreement shall be limited to [d]isputes submitted to the [b]oard before delivery of the notice requiring appointment of a new [b]oard. Nothing shall prohibit Port or [Shimmick] from reappointing its current member."

The Port argued that section 2.5 of the DRB Agreement allowed the Port to dismiss the current board and require the appointment of a new board to resolve future disputes – regardless of the specific, detailed provisions governing board member termination in section 18.2 of Book 1. The Port argued the two provisions should be harmonized, and that, since section 18.2 of Book 1 was silent as to termination of the entire board (and spoke only of termination of individual members), there was no conflict.

Shimmick proffered this explanation of section 2.5: The provision "referenced only an 'acknowledgement' by the DRB members of a right that did not exist [citation]." Shimmick argued that, at best, the provision was ambiguous and had been reasonably understood by both parties in the earliest stage of the dispute as not granting a unilateral termination right. That "mutual interpretation should be treated as a mutual mistake before applying a contrary interpretation."

4. *Hearing on the Cross-Petitions*

The trial court held a hearing on the cross-petitions under the Arbitration Act.

A. *The Court's Jurisdictional Ruling*

At the hearing, the court initially raised doubts about its jurisdiction. Shimmick had brought a petition to compel arbitration, yet the parties had not even suggested there was a limited dispute ripe for arbitration. The court was concerned that it was improperly being asked to render an advisory opinion, explaining, "There is no identifiable dispute for me to order to arbitration."

Although the trial court was factually correct, the parties both argued that there was jurisdiction for the court to resolve the matter under the Arbitration Act. But each relied on a different part of the Act to support its argument. The Port argued section 1281.6 gave the court jurisdiction to establish the composition of the arbitration panel.[11] For its part, Shimmick turned to section 1281.8, which allows a trial court to enter a preliminary injunction prior to an arbitration, "upon the ground that the [arbitration] award to which the applicant may be entitled may be rendered ineffectual without provisional relief." The absence of an arbitrable dispute notwithstanding, the court ultimately was persuaded that it had jurisdiction under section 1281.8, and asked the Port whether it agreed. The Port's counsel

---

[11] That section provides, in part: "If the arbitration agreement provides a method of appointing an arbitrator, that method shall be followed. If the arbitration agreement does not provide a method for appointing an arbitrator, the parties to the agreement who seek arbitration and against whom arbitration is sought may agree on a method of appointing an arbitrator and that method shall be followed. In the absence of an agreed method, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails to act and his or her successor has not been appointed, the court, on petition of a party to the arbitration agreement, shall appoint the arbitrator."

replied, "Probably," and then acknowledged that there was jurisdiction under the Arbitration Act generally.

The court next addressed whether its jurisdiction, now invoked, extended to mediations, the DRB's main function. Shimmick argued that the DRB's arbitration and mediation functions overlapped and could not be separated. The Port replied, "Your order, from our perspective, is going to establish the composition of that panel. We agree that the order you enter establishing the composition of that panel establishes the composition of the panel for all purposes under the contract." Although the Port argued that Shimmick was improperly seeking an order compelling mediation, the Port expressly agreed that the court had jurisdiction to determine the panel. The court was unbowed and stated that it would rule on "how the panel must be constituted," but its "order would only apply to the limited jurisdiction [matters] because that is the only thing that has a binding arbitration." If the parties wanted a ruling on the composition of the panel for mediation matters, the court advised the parties would have to pursue their claims "in contract."

B. *The Court's Substantive Ruling*

The court then turned to the merits of the dispute. The court offered an interpretation of section 2.5 of the DRB Agreement that was somewhat different than what was offered by either party. The court stated it found that section 2.5 could be harmonized with the other clauses in the contract. The court began with the premise that whenever even one member of the DRB is changed, the result is a "new" board. Section 2.5 simply provided that, in the event a "new" board comes into being due to the replacement of one or more members under section 18.2.5.1 of Book 1 of the contract, the "old" board would continue to resolve

old disputes and receive compensation for its work. The court was particularly persuaded by the use of the word "acknowledge" in section 2.5 ("The [b]oard [m]embers acknowledge that Port and [Shimmick] each have the right to require appointment of a new disputes review board . . . .") The court believed that "acknowledge" does not suggest the creation of a new right, but simply the acknowledgement of a right that exists elsewhere. In this case, the court found that right to be the termination right in section 18.2.5.1.

The court went on to explain that it was attempting to harmonize section 2.5 of the DRB Agreement with section 18 of Book 1. It stated that section "18 is clearly intended to be the end-all and be-all of how you appoint, how you terminate, how you reappoint. That is – clearly, that is where you meant to put it. And then out of the blue, you have a new right in this other agreement that is for the board members to sign? [¶] That doesn't seem to make a lot of sense. What seems to make far more sense is that you can read this in a way that only 18 contains those rights. That is the way I have read it, in harmony with what 18 has."[12]

The parties were directed to meet and confer regarding language for the court's order. They also agreed to discuss whether there was anything left to be resolved with respect to the cross-complaints for declaratory relief.

---

[12] The court offered the following hypothetical: If a board member chose to withdraw, but gave six months' notice of withdrawal, one of the parties could require a replacement be appointed within the section 18 requirement of 30 days. This would be "requiring the appointment of a new board," which would commence new work, while the old board would continue processing old work, under section 2.5.

C. *The Withdrawal of the Cross-Complaints*

The parties disputed the terms to be included in the court's order. Now that Shimmick was prevailing on the merits, the Port took the position that the court's order regarding composition of the DRB must be limited to the composition of the panel for arbitration purposes only. The dispute was resolved at a case management conference.

After the trial court expressed disappointment that the Port was taking a position contrary to the representations it had made at the prior hearing, the Port backpedaled and agreed that the court's ruling resolved the issues in its declaratory relief complaint and that no further proceedings were necessary.

The parties filed a joint stipulation dismissing their declaratory relief complaints without prejudice.

D. *The Court's Written Order*

On April 24, 2019, the trial court issued its order granting in part Shimmick's petition to compel and denying the Port's. The court concluded its jurisdiction was under section 1281.8, and construed the parties' petitions as applications for provisional relief under that section.

As to contract interpretation, the court concluded that section 18 governed termination of panel members and did not allow for unilateral termination of the entire panel. Section 2.5 of the DRB Agreement was interpreted in harmony with those provisions as a simple acknowledgement of the rights the parties granted in section 18. Section 2.5 "does not create any new rights between the [p]arties." The Port's letter purporting to terminate the entire board was therefore void and without legal effect.

The court's order prohibited the Port from: (1) refusing to maintain the contractual DRB Panel; (2) terminating its member

without replacement; and (3) refusing to nominate a replacement for Holt to complete the standing panel within 30 days of entry of the order.

E. *Proceedings Following Entry of Order*

On May 17, 2019 – within 30 days of the court's order – the Port nominated a replacement for Holt. Shimmick approved the nominee.

On June 6, 2019, the Port served notice of entry and on June 7, 2019, it filed its notice of appeal.

Shimmick filed a motion to dismiss the appeal on the grounds that it was taken from a nonappealable order. We denied the motion, without prejudice to the parties arguing the issue in their briefs.

Shimmick's previously-appointed DRB member (Meyer) declined further service on the DRB and on August 9, 2019, Shimmick submitted a replacement nominee.

On December 5, 2019, the Port signed a new DRB Agreement, which had already been executed by Shimmick, and the three board members (Smith from the prior board, and the parties' new appointees). The new agreement did not differ materially from the original version. In its respondent's brief, Shimmick argued that Port's execution of the new DRB Agreement rendered its appeal moot.[13]

---

[13] On appeal, Shimmick submitted the facts relating to the new board members and new DRB Agreement in a request for judicial notice. The Port does not dispute these facts, but questions their relevance. We grant the request for judicial notice.

DISCUSSION

Before we reach the issue of contract interpretation, we must address Shimmick's contentions that the appeal must be dismissed as either taken from a nonappealable order or because it is moot. Working backward further, before we can address whether the appeal was taken from a nonappealable order, we first must determine the legal basis of the trial court's order.

Thus, we approach the legal issues in this order: (1) whether the trial court's order was lawfully entered under the Arbitration Act; (2) whether the trial court's order extended to the DRB acting in its mediation capacity; (3) whether the trial court's order is nonappealable as an order preliminary to arbitration; (4) whether the appeal is mooted by the Port's execution of a new DRB Agreement; and, finally, (5) the substantive issue of contract interpretation.

Working backward even further, before we address these issues, we provide a brief description on the limited case law that has considered the DRB process.

1. *Case Law Descriptions of Disputes Review Boards*

There have been a few published cases in California addressing DRBs. None of the cases we have reviewed involved a hybrid DRB – one acting as both mediation panel and arbitration panel. Instead, they have involved DRBs acting only in their non-binding capacity. Judicial descriptions of the general DRB process follow.

"At the planning stage of a large construction project, the [owner] and contractor sometimes agree to organize a three-member Disputes Resolution Board (DRB) to offer recommendations for the resolution of the disputes that will inevitably arise during construction. Typically, the owner and

contractor each designate one member of the DRB and those two members, in turn, select the third." (*Los Angeles County Metropolitan Transportation Authority v. Shea-Kiewit-Kenny* (1997) 59 Cal.App.4th 676, 678.)

"The DRB process constitutes a form of alternative dispute resolution (ADR) most commonly employed in tunneling and other large, complex, heavy construction projects. First utilized in the mid-1970's, it has proven particularly advantageous in contracts performance of which will take a long period of time, and in which disputes are inevitable and multiple installment payments are contractually required on completion of performance milestones or components of the work. Generally, the DRB serves as a safety net to resolve problems or matters about which reasonable people could differ before they harm the business relationship between the parties and result in acrimonious litigation. It is composed of three experts, selected by the parties at the beginning of the project, who become familiar with it, monitor its progress and are available to provide advisory decisions on short notice concerning disputes the parties are unable to resolve themselves. The availability of the DRB and its familiarity with the project enable prompt resolution of disputes, which furthers the goal of preserving cooperative relationships between the contracting parties. The DRB process resembles the arbitration process with several significant differences. First, the DRB is a standing tribunal contractually required to be formed and in place within a few months after the owner gives the contractor notice to proceed. Second, the process envisions an introductory/orientation meeting for the DRB members to become acquainted with the owner, the contractor, and their key personnel; a brief history of the project, including

significant potential technical, environmental, political or social issues that might arise from it; and the scope and anticipated schedule of construction. Third, the DRB meets regularly throughout construction of the project. The frequency of meetings is dictated by the project's size, complexity, schedule and number of claims or problems. Fourth, unlike standing arbitrators who make immediately binding decisions, the DRB issues advisory opinions or nonbinding recommendations. [Citations.]" (*Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc.* (2003) 111 Cal.App.4th 1328, 1338–1339.)

2. *Basis of Trial Court Jurisdiction*

The trial court stated that it was exercising its jurisdiction under section 1281.8 to enter a preliminary injunction to provide provisional relief necessary to prevent a subsequent arbitration award from being ineffectual; Shimmick agreed. The Port instead argued that the court had jurisdiction under section 1281.6, to establish the composition of the arbitration panel.

For our purposes, the difference between the statutory provisions as a basis for jurisdiction is not significant. When a court orders the appropriate method for selection of an arbitrator, the court would appear to be acting under the express authority of section 1281.6 to "compel compliance with a method for selecting an arbitrator." (*Maggio v. Windward Capital Management Co.* (2000) 80 Cal.App.4th 1210, 1213.) Or, it could also be a proper exercise of the court's authority under section 1281.8 to enter a provisional remedy to prevent a future award from being "rendered ineffectual" under section 1281.8, subdivision (b).

We need not choose statutory sides. What is clear is that both parties petitioned for provisional relief under the

Arbitration Act, both parties agreed that the court had jurisdiction to enter relief under that act, and the court, in fact, exercised its jurisdiction to enter provisional relief under the act.[14]

3. *The Court's Jurisdiction was Not Limited to Arbitration Matters*

The Port next argues that the court's order was overbroad, in that it purported to affect the composition of the DRB as a mediation panel, when the court's jurisdiction (under the Arbitration Act) was limited to determining the composition of the DRB as an arbitration panel.[15]

This argument might be persuasive were it not for the fact that the Port and Shimmick both agreed that the DRB was a single entity and that the court's ruling as to the composition of the DRB as arbitrators would also apply to the composition of the DRB as mediators. We have set forth the procedural history of this case at length above. Shimmick, for its part, always believed that the court's resolution under the Arbitration Act of the DRB membership would apply in both circumstances, and only filed its cross-complaint for declaratory relief after the Port raised the

---

[14] The court's final order stated in part: "The court FINDS that neither petitioner nor respondent contest the court's jurisdiction to order the relief herein and that both petitioner and respondent filed cross-complaints seeking declaratory relief related to their cross-petitions."

[15] Although the Arbitration Act does not expressly define "arbitration," case authority has held that a manner of dispute resolution cannot be considered arbitration if it is not binding. (*Cheng-Canindin v. Renaissance Hotel Associates* (1996) 50 Cal.App.4th 676, 684, 687–688.)

possibility that a ruling under the Arbitration Act may not be sufficient. The Port's position on the issue was shifting. However, at the final case management conference, when the court asked if there were any factual or legal questions left for resolution and whether it should set a trial date on declaratory relief, the Port agreed that there were no issues left to resolve. The Port expressly conceded that the court's ruling "disposes of the issues in our declaratory relief complaint." The Port cannot now be heard to complain that the court did not, in fact, resolve those issues.

4. *The Order is Appealable*

Shimmick argues that, because the court's order under the Arbitration Act was simply preliminary to arbitration, it is not an appealable order.

Appealability of orders under the Arbitration Act is governed by section 1294; however, we look to section 904.1, governing appealability generally, for guidance in interpreting section 1294. (*Fleur du Lac Estates Assn. v. Mansouri* (2012) 205 Cal.App.4th 249, 255.)

Section 1294 does not discuss the appealability of preliminary or injunctive orders under the Act. Section 904.1, subdivision (a)(6) however, provides that orders granting injunctions, or refusing to grant injunctions, are appealable. Courts have resolved appeals granting injunctions under section 1281.8. (E.g., *Jay Bharat Developers, Inc. v. Minidis* (2008) 167 Cal.App.4th 437.)

Shimmick's argument against appealability is that the court's order was preliminary to arbitration, and is therefore non-appealable on the same basis that an order compelling arbitration is not appealable. (*Melchor Investment Co. v. Rolm*

Systems (1992) 3 Cal.App.4th 587, 591.) The flaw in Shimmick's position is that the court's order was not preliminary to any particular arbitration. Shimmick failed to identify any limited dispute with the Port which was ripe for arbitration – only a dispute which *might* reach the point of DRB arbitration if the multi-level informal dispute resolution process failed. Indeed, the trial court declined to accept Shimmick's construction of its petition as a petition to compel arbitration, on the basis that, were it to do so, it would risk rendering an improper advisory opinion.

The parties argued at length before the court on whether any legal or factual issues remained to be decided. At one point the court offered to set a trial date. The parties went back and forth at the hearing but in the end agreed there was nothing left for the court to decide. The final concession strikes us this way: Although the order may have been "provisional" under the Arbitration Act, the court's order included a permanent injunction resolving all issues before it. No particular arbitration could be presented to the court in the case before it. As such, the order was final and appealable under section 904.1.[16]

5. *The Appeal is Not Moot*

Shimmick argues that the Port's appeal is mooted by the Port's execution of the new DRB Agreement while the appeal was pending.

---

[16] The court's rejection of part of the order offered by Shimmick confirms our analysis. Shimmick's draft contained as paragraph 13: "This Preliminary Injunction shall take effect immediately and shall remain in effect pending trial in this action or further order of this court." The order signed by the court deleted "preliminary" and took out the reference to trial or further order of the court.

" 'A party who voluntarily complies with the terms of a judgment, or who satisfies it by voluntary payment or otherwise, impliedly waives the right to appeal from it.' [Citations.] The underlying rationale for this rule that an appeal is dismissed where the judgment is satisfied is because the satisfaction moots the issues on appeal. [Citation.] However, compliance or satisfaction that is compelled does not constitute a waiver of the right to appeal. Such a waiver is implied only where the satisfaction or compliance is the product of compromise or is coupled with an agreement not to appeal. [Citations.]" (*Ryan v. California Interscholastic Federation* (2001) 94 Cal.App.4th 1033, 1040.)

The Port argues that it did not voluntarily comply with the court's order; it felt it was required to do so or risk contempt. Whether the Port was correct in its implied understanding that the court's order was not stayed by its appeal is beside the point; in this case, it is clear that the Port did not sign the new DRB Agreement as the product of compromise or accompanied by an agreement not to appeal.

Moreover, the dispute is not moot in any practical sense. " 'Generally, courts decide only "actual controversies" which will result in a judgment that offers relief to the parties.' [Citation.] 'Thus, appellate courts as a rule will not render opinions on moot questions . . . .' [Citation.] 'A case becomes moot when a court ruling can have no practical impact or cannot provide the parties with effective relief.' [Citation.] An appeal from an order denying an injunction may be dismissed as moot if the act sought to be enjoined is performed while the appeal is pending. [Citation.] But, where a court can afford the party at least some relief, even if not all the relief originally requested, the court

should not dismiss a case as moot. [Citations.]" (*City of Cerritos v. State of California* (2015) 239 Cal.App.4th 1020, 1031.)

Here, relief could be afforded the Port. The Port wanted to proceed with a DRB which contained three new members; it now has a DRB with two new members and Smith, the original third member. The project is still ongoing and there is certainly no evidence that the DRB has finished its work; thus, there is still time to give the Port the relief it seeks: a new DRB with all new members.[17] The new DRB Agreement signed by the parties pending appeal contains the same section 2.5; thus, the issue of the language's interpretation may arise again, with the new DRB. (*Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 473, 479–480 [court may retain jurisdiction over moot appeal if controversy is likely to recur between the parties].)

6. *The Court Did Not Err in Resolving the Contractual Dispute in Favor of Shimmick*

We now turn to the merits of the appeal. The issue presented is whether section 2.5 of the DRB Agreement provides a party with the unilateral right to cause the creation of a new DRB.

A. *Interpretation of Contracts*

"As the Supreme Court said, 'The fundamental rules of contract interpretation are based on the premise that the interpretation of a contract must give effect to the "mutual

---

[17] Shimmick argues that the relief the Port sought was a new DRB and now, it has a new DRB, so it "has obtained all its requested substantive relief." This argument is frivolous; Shimmick well knows that the Port wanted to replace all three members of the DRB.

intention" of the parties. "Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. (Civ. Code, § 1636.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*Id*. § 1639.) The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' (*id*. § 1644), controls judicial interpretation. (*Id*. § 1638.)" [Citations.]' [Citation.]" (*U.S. Bank National Assn. v. Yashouafar* (2014) 232 Cal.App.4th 639, 646.)

"When faced with a dispute over the meaning of a contractual provision, the court must first determine whether the provision is ambiguous, i.e., whether, on its face, the language of the provision is capable of different, yet reasonable interpretations. [Citations.] If an ambiguity is found, the court must determine which of the plausible meanings the parties actually intended. [Citations.] When the parties offer no extrinsic evidence concerning the meaning of the contractual language, or when the extrinsic evidence offered is not in conflict, ascertaining the intended meaning is solely the duty of the court. [Citations.]" (*Falkowski v. Imation Corp.* (2005) 132 Cal.App.4th 499, 505–506.) " 'Courts will not adopt a strained or absurd interpretation in order to create an ambiguity where none exists.' [Citation.]" (*Bay Cities Paving & Grading v. Lawyers' Mutual Insurance Co.* (1993) 5 Cal.4th 854, 867.) Language must be construed in the context of the instrument as a whole, under the circumstances of the case, and cannot be found to be ambiguous in the abstract. (*Ibid.*)

" 'Generally the parties to an instrument intend every clause to have some effect and in some measure to evidence their agreement, and this purpose should not be thwarted except in the plainest case of necessary repugnance. Even where different parts of the instrument appear to be contradictory and inconsistent with each other, the court will, if possible, harmonize the parts and construe the instrument in such way that all parts may stand and will not strike down any portion unless there is an irreconcilable conflict wherein one part of the instrument destroys in effect another part.' [Citations.]" (*Southern Pacific Land Co. v. Westlake Farms, Inc.* (1987) 188 Cal.App.3d 807, 822.)

In this case, there was some extrinsic evidence introduced; specifically each party relied on what it believed to be course-of-performance evidence. Shimmick relied on the Port's letters in 2014 which reflected a belief that it could not "dismiss all members of the DRB" without Shimmick's agreement. The Port, for its part, relied on Shimmick's consent to adding section 2.8 to the DRB agreement, which characterized section 2.5 as providing for the "appointment of a new disputes review board to resolve future [d]isputes." While the parties dispute the effect to be given to this extrinsic evidence, neither one disputes the truth of the evidence offered by the other. As such, there is no factual conflict, and we approach interpretation of the contract de novo.

B. *The Port's Interpretation of Section 2.5 of the DRB Agreement is Not Supportable*

Our first order of business would typically be to determine whether section 2.5 of the DRB Agreement is ambiguous – that is, whether, on its face, the language of the provision is capable of different, yet reasonable interpretations. We conclude this task

is largely unnecessary. Assuming, without deciding, that the language of the provision, standing alone, is reasonably amenable to the Port's interpretation, that interpretation fails in the context of the contract in its entirety.

Section 2.5 provides: "The [b]oard [m]embers acknowledge that Port and [Shimmick] each have the right to require appointment of a new disputes review board to resolve future [d]isputes, which right may be exercised at any time by delivery of notice to such effect to the other party and to the [b]oard [m]embers. In such event a new agreement in the same form as this agreement will be executed establishing the new board, and except as otherwise mutually agreed by Port and [Shimmick], the work to be performed by the [b]oard established under this Agreement shall be limited to [d]isputes submitted to the [b]oard before delivery of the notice requiring appointment of a new [b]oard. Nothing shall prohibit Port or [Shimmick] from reappointing its current member."

The Port interprets the language as meaning the parties each have the right, on notice, to require the appointment of a new DRB, which will resolve new disputes, while the existing DRB will continue to resolve disputes already submitted to it. On its face the language does not *create* such a right; at most it purports to *acknowledge* the existence of a right assumed to have been created elsewhere. But there is no "there" elsewhere: Nowhere do the contractual documents create a unilateral right to compel appointment of a new board.

We find it significant that the Port did not express – and therefore presumably did not believe – until June 2017 that it had a unilateral right to compel the appointment of a new board. That was five years into the contract and nearly three years after

the Port dismissed Holt and refused to appoint a replacement. Until June 2017, the Port's position had been that – in accordance with the language of section 18.2 of Book 1 of the contract – the Port could unilaterally terminate *only* Holt, and could not force any other changes in DRB membership unless Shimmick agreed. While the Port and Shimmick disagreed as to how to resolve their disputes in the meantime, they agreed – until the Port's delayed invocation of section 2.5 – that they were, in fact, at a stalemate, because the Port refused to appoint a replacement for Holt and Shimmick refused to agree to terminate the rest of the board. The fact that the parties allowed their dispute to simmer for years before the Port suggested section 2.5 gave it the right to demand a new board is indicative that, at the time the contract was executed, neither party believed section 2.5 created such a right.[18]

We acknowledge there is nothing inherently unreasonable for an agreement to provide a unilateral right to a new board. In one of the earlier California cases involving a DRB, there was expert testimony explaining that both parties must have confidence in the DRB as a whole, and its members, if the DRB's

---

[18] We are mindful that it is the conduct of the parties after execution of the contract and before any controversy has arisen as to its effect which is relevant to statutory interpretation. (*Kennecott Corp. v. Union Oil Co.* (1987) 196 Cal.App.3d 1179, 1189–1190.) Although an impasse had arisen in October 2014 when the Port terminated Holt, the controversy regarding the meaning of section 2.5 did not arise until the Port purported to rely on it in July 2017, long after the Port had staked out its original position.

recommendations will actually be effective.[19] (*Los Angeles County Metropolitan Transportation Authority v. Shea-Kiewit, supra*, 59 Cal.App.4th at pp. 683–684.) Parties could reasonably give themselves a right to a new Board whenever they had lost confidence in the old Board. Here, they did not.

We also understand the Port's concern that mediation in particular is only viable when the parties have confidence in the mediation panel. The time to ensure confidence was in the negotiation process that culminated in section 18, and in the disclosure, vetting, and objection process for appointing DRB members. Confidence has to exist hand in hand with an efficient DRB operation. The value of a DRB is, at least in part, as an ongoing entity which exists for the duration of the project. (See *Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc., supra*, 111 Cal.App.4th at pp. 1328, 1338–1339 ["the DRB is a standing tribunal"].) If the parties could demand a new board to resolve new disputes at any time, essentially there would be no DRB at all – the contract would provide instead for a series of unrelated mediations, where the parties would decide before submission of each new dispute whether to retain or replace the existing mediators.[20]

---

[19] The Port relied on language in a treatise to the same effect.

[20] The Port also relies on section 2.8 which refers to the "appointment of a new disputes review board to resolve future [d]isputes in accordance with [s]ection 2.5." But section 2.8 does not create such a right; the quoted language is a prefatory clause to the indemnification and continued compensation rights created in section 2.8. At most section 2.8 tracks section 2.5. More telling, neither section creates a unilateral contractual right to a new board.

C. *Even if the Port's Interpretation were Correct, the Construction would Create a Conflict with Section 18; under the DRB the latter prevails*

Even if we were to conclude that section 2.5 allows either party, at any time, to require the appointment of a new board, that interpretation would not assist the Port. Such a construction would directly conflict with the provisions for the creation and operation of the board set out in section 18.2.5.1. Under section 8.3 of the DRB agreement, if there is a conflict between section 2.5 of the DRB Agreement and section 18 of Book 1, the latter prevails. Section 18.2.5.1 provides, in great detail: (1) a party may terminate any member for cause; (2) a party may unilaterally terminate the member it appointed for any reason; and (3) the third member may be terminated on the joint recommendation of the party-appointed members and the agreement of the parties. None of this would matter if a party could unilaterally insist on the appointment of a new board. Two examples suffice: If either party could demand unilaterally the appointment of a new board, the requirement that the other party's member be terminated for cause would never come into play. There would be no need for a party to ever terminate a board member for cause if the party could demand a new board without cause under section 2.5. The provision for termination of the third member on the mutual agreement of the party-appointed members and the parties would likewise be rendered unnecessary if a single party could effectuate the removal of the third member by the simple expedient of unilaterally requesting a new board.

The Port posits that its reading of section 2.5 of the DRB Agreement is not in conflict and can be harmonized with section

18.2 of Book 1. It suggests that section 18.2 governs only termination and replacement of individual members while section 2.5 governs the appointment of an entirely new board. This is a distinction that makes no difference. A board is comprised of three members; a clause allowing replacement of all three members at will contradicts a clause specifically limiting the circumstances in which two of those individual members may be replaced.

We conclude that the Port's interpretation undermines the carefully crafted dispute resolution process to which the parties agreed in great detail in section 18.2 of Book 1.

DISPOSITION

The order is affirmed. Shimmick is to recover its costs on appeal.

RUBIN, P. J.

WE CONCUR:

BAKER, J.

KIM, J.